

ACST TASMANIA - IMPLEMENTATION OF MODERN AWARDS & NES GUIDE AND OPTIONS DOCUMENT

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Subject	Issue	Options	Outcome (for member use)
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What applies as of 1 January 2010?

- NES commences for all employees (i.e. new personal leave provisions, new compassionate leave provisions, new hours of work provisions, notice, community service leave, etc – see generally NES provisions that follow)
- Some of the Modern Award provisions commence (see below)
- Flexibility arrangements can be entered into
- Consultation clause requirements
- Disputes resolution procedure
- Termination provisions
- Allowances that have not previously been paid will have to commence
- The manner in which TOIL is calculated and taken but not as to actual payments
- Superannuation e.g. voluntary contributions, funds
- Span of hours
- Breaks
- Roster requirements
- ADOs

NIL

	<ul style="list-style-type: none">• Minimum engagements (2 hours) – see Homecare and Aged Care, but not expressly mentioned in the Nurses Award other than the casual minimum is 2 hours; Home Care Award has (3 for social and community, 1 home care and 2 for all others)• Broken shifts• Breaks• Ceremonial leave		
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<p>What applies as of 1 July 2010?</p>	<p>Transitional provisions commence for wage-related provisions of the Modern Awards i.e.</p> <ul style="list-style-type: none"> • minimum wages • Classification of employees (i.e. new levels) • casual and part-time loadings • Saturday, Sunday, public holiday, evening and other penalties; and • shift allowances/penalties 	<p>The primary option is to comply with the Modern Award provision which entitles the phasing in of the new rates over a 5 year period.</p> <p>Employers could choose to make payment as of 1 January 2010 and they could actually go further by not transitioning or phasing in any of pre-modern award payments.</p>	
<p>What applies 1 January 2011?</p>	<ul style="list-style-type: none"> • Modern Awards for State reference instruments (i.e. State-based employers) ** There is a considered view that there are no members of ACST who are currently in the state system. 	<p>NIL</p>	

<p>Do Modern Awards cover all ACST members?</p>	<ul style="list-style-type: none"> • Yes (but note the timing difference for State based employees) 		
<p>Do the NES apply to all ACST members?</p>	<ul style="list-style-type: none"> • Yes • The NES will also apply to <u>all employees</u>, regardless whether they are covered by a transitional instrument (e.g. Agreement, NAPSA, Federal Award i.e. Transitional or Pre-Reform, or State based). • No detriment rule – line by line comparison of term in the agreement against term in the NES. If a term in agreement is detrimental in any respect, the term will be of no effect • Even covers High Income Employees such as CEOs, Manager, CFOs etc • If a state or territory law provides a more beneficial entitlement in relation to flexible working arrangements or community service leave, those entitlements will apply. 	<p>NIL. Observance is mandatory.</p>	

	<ul style="list-style-type: none"> • The NES provides the basics for employment. However, 'Supplementary' entitlements in respect to a particular standard are not contained in the NES for award/agreement covered employees. They may be included in the <u>Modern award</u>. (e.g. cashing out annual leave) • If the employee is award/ agreement free, the NES sets out default rules that apply. • FWA may vary a transitional agreement on application <ul style="list-style-type: none"> • To resolve uncertainty or difficulty relating to the interaction between it and the NES • To make the instrument operate effectively with the NES 		
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Is there any distinction between new and existing employees as to the application of the Modern Award?

- Theoretically there should not be but technically there can be.
- For example where the NAPSA provides for a higher amount than the modern award the employer is theoretically able to phase down on the higher NAPSA a rate towards the lower modern award rate by the 20% amount. Similarly an employee who commences after the phase in transitional period should also start on the higher NAPSA rate as transitioned (i.e. less 20% amount). The problem is that the existing employee could theoretically seek (and in all likelihood probably will) a take home pay order so that the original NAPSA rate is not reduced. Whereas the new employee could not theoretically make application for a take home pay order. And therefore would be only entitled to be NAPSA rate less 20% of the transitional amount.
- It is the Employer that determines who is covered so there won't be two types of employee with

Employers will have to make a decision as to whether they maintain new employees on the same higher rate as the current employees.

**NB The transitional rates apply only to the NAPSA (ie as the comparator) not what the employer is paying vs the Modern Award rates.

Ultimately this means that all employees will be subject to over award payments. The decision then is whether to provide increases as per national wage orders or to simply

	<p>differing rates of pay.</p> <ul style="list-style-type: none"> • The transition to the Modern Award happens with reference to the instrument that applied or would have applied prior to 1 January 2010. • The AIRC said that it was desirable that all employers covered by the modern award should be bound by the same transitional provisions. So far as practicable the same minimum obligations should apply to all employers and the same minimum entitlements should apply to all of the employer's employees. Employers who are obliged by the transitional provisions to pay minimum wages higher than those in the modern award during the transition period might be at a significant disadvantage if employers were permitted to come into the industry after 1 January 2010 and operate under the modern award conditions. Such a situation might have serious consequences for competitiveness and perhaps for employment. • The AIRC stated that the transitional instruments 	<p>maintain the existing wage rates and absorb everything until it is caught up under the modern award and national wage orders. It would be very difficult to maintain good recruitment if the employer was the only employer who effectively froze rates to make use of the over award status.</p>	
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	<p>apply to</p> <ul style="list-style-type: none">• employers who are covered by a transitional minimum wage instrument or award-based transitional instrument prior to 1 January 2010• employers who would have been covered by such an instrument but for the operation of an agreement• employers who would have been covered by an award had they been employers in the industry or occupation is covered by the award prior to 1 January 2010		
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<p>Is there any distinction between new and existing employees as to the application of the NES?</p>	<ul style="list-style-type: none"> • No. It is universal in application. 	<p>NIL</p>	
<p>What transitional arrangements will apply to non-national system (i.e. State-based) employers?</p>	<ul style="list-style-type: none"> • The current awards will be Frozen like NAPSAs <ul style="list-style-type: none"> • Nursing Homes Award • Nurses Award • Community Services Award • The NES will apply on a no-detriment basis • Minimum wages will continue on a no-detriment basis (i.e. the first NWO will be flowed on) • FWA will determine how State based instruments will transition by 31 December 2010 	<p>** There is a considered view that there are no members of ACST who are currently in the state system – but there may be State reference employers (ie Govt Departments etc). Members should seek their own individual interpretation of this critical jurisdictional threshold issue.</p> <p>Employers could choose to make payment as of 1 January 2010 and they could actually go further by</p>	

		not transitioning or phasing in any of pre-modern award payments.	
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<p>When do we expect minimum wages to increase?</p>	<ul style="list-style-type: none"> • These will be referred to as National Wage Orders (NWOS) • 1 July 2010 and yearly thereafter 	<p>NIL</p> <p>NB Overawared payments are able to be absorbed.</p>	
<p>Will employees have to be reclassified as per the modern award?</p>	<ul style="list-style-type: none"> • Yes. Employees must be classified as per the modern award classification structure. This may mean employees move up and down their levels. Bear in mind that a take home pay order may be implemented where an employee's take-home pay is reduced as a result of the modern award process. 	<p>Consider grandfathering classifications as they currently exist and only classify new employees under the altered classification structure.</p> <p>Consider implementing the classification structure as per the modern award and seeking to enforce the phased-down provisions of the transitional arrangements.</p> <p>ACST recommend implementing a process to</p>	

		provide industry examples and standard guidelines.	
Are you permitted to work employees more than 38 hours per week?	<ul style="list-style-type: none"> • 38 maximum ordinary hours per week and ability to request reasonable additional hours. • Averaging hours of work – most Modern Awards work off 152 hrs over 4 weeks (i.e. average of 38) • Award-free can go up to 6 months, • The Nurses Award provides for an average of 38 per week 76 per fortnight or 152 over 28 days, and the span of hours is from 6 a.m. to 6 p.m. Monday to Friday • The Home Care Award provides for an average of 38 hours per week, 76 within 10 shifts not exceeding eight hours each, 152 hours in a four week period provided that there are 19 eight hour shifts and the span of ordinary hours is between 6 a.m. and 8 p.m. Monday to Sunday • The Aged Care Award provides for an average of 38 per week, 76 per fortnight, 114 per 21 or 152 	<p>Provide for universal averaging provisions over a four week period.</p> <p>Alter contracts of employment to allow for averaging provisions.</p> <p>Use policy and common law contracts to show as much “reasonableness” exists already with the decision to work</p> <p>Establish industry benchmarks.</p> <p>Remember when looking at the provision of overtime</p>	

	<p>per four week period and the span of ordinary hours is from 6 a.m. to 6 p.m. Monday to Friday</p> <ul style="list-style-type: none"> • Issues relating to reasonable additional hours include <ul style="list-style-type: none"> • any risk to the employee's health and safety that might arise if the employee worked the additional hours • the employee's personal circumstances (including family responsibilities) • the operational requirements of the workplace or enterprise • the notice given by the employer of any request or requirement to work the additional hours • any notice given by the employee of his/her intention to refuse to work the additional hours • whether any of the additional hours are 	<p>calculation of penalties you must consider the weekly, daily and span of hours as contained in the Modern Award.</p>	
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	<p>on a public holiday</p> <ul style="list-style-type: none">• the employee's hours of work over the four weeks ending immediately before the employee is required or requested to work the additional hours (s 226(4)).• Any additional hours above 38 per week in an averaging arrangement must be reasonable		
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<p>Are the breaks in the Modern Awards paid or unpaid?</p>	<ul style="list-style-type: none"> • The Modern Awards, where an employee works in excess of 5 hours, provide for meal breaks of not less than 30 minutes and not more than 60 minutes are <u>unpaid</u>. • Where an employee works more than 7.6 hours per day they are entitled to 2 x 10 minute breaks which are paid. 	<p>Consideration will need to be made for rostering to enable the maintenance of the same number of paid hours but most likely over a greater period of time to incorporate the unpaid break.</p>	
<p>If a part-time employee works more than contracted hours do the additional hours amount to overtime?</p>	<ul style="list-style-type: none"> • Under the Aged Care award where hours are extended they will not be regarded as overtime but as an extension of the contract hours for the day and will be paid at the ordinary rate of pay. • The Home Care Award and virtually mirrors the Aged Care Award. • The Nurses Award all time worked by a part-time employee in excess of the rostered daily ordinary <u>full-time</u> hours are paid as overtime. 	<p>It would be permissible to pay overtime for the hours in excess of the rostered hours for part-time employees however this would seem to be a retrograde step in comparison to implementing an IFA or other rostering alternative.</p> <p>It is important to stress this</p>	

		in contracts of employment to make sure that this is understood given there was plenty of press to the contrary at the commencement of the modern award process.	
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<p>Is time off in lieu available?</p>	<ul style="list-style-type: none"> • Under the Aged Care Award time off in lieu is taken at ordinary rates, i.e. on a time-for-time basis. Taking the time off in lieu must have occurred within a three-month period or the appropriate overtime rate is payable. • The Home Care Award mirrors the Aged Care Award. • Under the Nurses Award employees may take time off in lieu plus a period of time equivalent to the overtime or penalty incurred. 	<p>The fact that the Nurses Award provides for time-for-penalty is problematic and could only be sorted out through the agreement process.</p> <p>Consider that all overtime is to be paid out to avoid the confusion of how all overtime is paid in lieu</p>	
<p>What flexible work arrangements can an employee request?</p>	<ul style="list-style-type: none"> • Right to request flexible working arrangements for an eligible parent or person with responsibility for the care of a child under school age or person under 18 with a disability, to assist with their care. • Examples of changes in working arrangements may include: 	<p>Commence writing industry wide policies to ensure that employers have protection for this type of situation.</p> <p>Update position descriptions to ensure that the requirements of the</p>	

	<ul style="list-style-type: none"> • changes in hours of work (e.g. reduction in hours worked, changes to start / finish times) • changes in patterns of work (e.g. working 'split-shifts' or job sharing arrangements) • changes in location of work (e.g. working from home or another location). • Includes casuals who have been employed on a regular and systematic basis for a sequence of periods of employment of at least 12 months, immediately before making the request • An employer <u>may refuse</u> a request in writing on <u>reasonable business grounds</u> e.g. <ul style="list-style-type: none"> • the effect on the workplace and the employer's business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service 	<p>position are spelt out in particular what duties must be performed on site.</p> <p>Have template letters at the ready to be tailored for a quick response for each specific incident.</p>	
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	<ul style="list-style-type: none">• the inability to organise work among existing staff• the inability to recruit a replacement employee• the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee's request. <p>A refusal is not subject to review unless the parties agreed to include a term in their enterprise agreement / employment contract that allows a review by FWA or an independent party</p>		
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When does an employee get five weeks annual leave?

Award/Agreement covered employees

If a modern award or enterprise agreement defines or describes the employee as a shift worker, the additional week leave will apply.

Award/Agreement free employees The employee will qualify for the additional week leave if the employee is a shift worker as defined in the *Fair Work Act*. They must meet all of the following criteria:

- they are employed in an enterprise where shifts are continuously rostered 24 hours a day for seven days a week
- they are regularly rostered to work those shifts
- they regularly work on Sundays and public holidays.
- Under the NES a shift worker is defined as an employee who is regularly rostered to work his/her ordinary hours outside the ordinary hours of a day

Do an audit of all of your current employees to determine whether they fit into the shift worker definition or not.

This may necessitate an alteration of operational requirements.

	<p>worker.</p> <ul style="list-style-type: none">• Under the Aged Care award a shift worker in addition to the entitlements under the NES is a person who works for more than for ordinary hours on 10 or more week ends.• Under the Nurses Award a shift worker is in addition to that provided by the NES a person who is regularly rostered over seven days a week and regularly works on weekends• Under the Home Care Award a shift worker is an employee who in addition to the NES works more than 4 ordinary hours on 10 or more weekends.		
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When does an employee get four weeks annual leave?	Continued entitlement to four weeks annual leave for non-shift workers.	NIL	
At what rate is annual leave accrued?	Accrual is usually the BASE rate of pay. This doesn't include separate entitlements such as incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates.	NIL	
Can you cash out annual leave?	No provision to do so under the Nurses or Aged Care Awards, but NES do permit such provisions in an award or agreement	Consider agreements to allow for cash out of annual leave or including in contracts of employment for award-free employees	
Is there a minimum or maximum that must be taken at a time?	There's no minimum or maximum amount of accrued annual leave that must be taken at a time	Establish policies which set out minimum and maximum periods of taking a leave.	
Can an employer require an employee to take excessive accrued leave?	If the employee has an excessive accumulated annual leave balance the employer's requirement or direction to take leave must be reasonable, taking	Establish policies which set out what is excessive leave and what processes will be undertaken to bring this	

	<p>into account factors such as:</p> <ul style="list-style-type: none">• the needs of the employee and the employer's business• any agreed arrangement with the employee• custom and practice of the business• timing of the direction or requirement to take leave <p>reasonableness of the period of notice given</p>	<p>into something more manageable - eight week rule was a good rule of thumb.</p>	
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<p>How many personal leave days does an employee get per annum?</p>	<p>10 days of paid personal leave per annum.</p> <p>This has been reduced from 20 days in the Nursing Homes Award and 23 in the Nurses Award.</p>	<p>You can either grandfather for persons with the existing 20 leave plus entitlements or simply rigidly enforce the new NES standard as 10 days from 1 January 2010 to all employees or transition the leave down as per the 20% rule.</p> <p>This will be a significant bargaining tool in EA negotiations.</p>	
<p>Is there any limit to paid carer's leave?</p>	<p>No. There will be <u>no annual limit</u> on taking paid carer's leave (previously 10 days max per year). An employee can take accumulated personal leave as carer's leave.</p> <p>Entitlement to unpaid carer's leave remains the same (2 days).</p>	<p>NIL</p>	

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What is the accrual rate of personal leave?	Accrual rate based on base rate of pay or ordinary hours.	NIL	
Do any of the modern awards provide for cash out of personal leave?	<i>Award/Agreement covered employees.</i> No. Under an enterprise agreement at <u>least 15 days leave</u> must be retained	If this was particularly important employer-employee could set up an enterprise agreement to deal with these issues.	
Are award-free employees entitled to cash out personal leave?	<i>Award/Agreement free employees.</i> No. There is no entitlement to cash out <u>paid personal leave</u> for award/agreement free employees	NIL	
What evidence requirements must employees provide to entitle them to take personal leave?	The Modern Awards do not include terms relating to the kind of evidence that an employee must provide in order to be entitled to paid personal/carer's leave, unpaid carer's leave or compassionate leave. They only require that a reasonable person be satisfied medical certificate, statutory declaration etc	Establish reasonable requirements for notification	

<p>Are employees entitled to take or accrue personal leave whilst on workers compensation payment?</p>	<p>No. An employee isn't entitled to take or accrue any personal/carer's leave or compassionate leave while getting workers' compensation payments unless there's an applicable federal, state or territory law about workers compensation that says otherwise</p>	<p>NIL</p>	
<p>What is the entitlement to compassionate or Bereavement leave?</p>	<ul style="list-style-type: none"> • 2 days per occasion – previously the NAPSAs provided for 3 days • Death or life threatening situation • No longer distinction with bereavement • Casuals = unpaid 	<ul style="list-style-type: none"> • Phase in. • Apply straight away • Grandfather? 	
<p>What notification requirements are required for compassionate or bereavement leave?</p>	<ul style="list-style-type: none"> • Modern Awards do not include terms relating to the kind of evidence that an employee must provide in order to be entitled to paid personal/carer's leave, unpaid carer's leave or compassionate leave. They only require that a reasonable person be satisfied e.g. death certificate/ notice, medical certificate, 	<p>Establish reasonable requirements for notification.</p>	

	statutory declaration etc		
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<p>When is community service leave available for an employee?</p>	<p>Community service leave providing an entitlement to be absent for voluntary emergency service management</p> <p>A 'voluntary emergency management activity' where all the following apply:</p> <ul style="list-style-type: none"> • the activity deals with an emergency or natural disaster • the employee engages in the activity on a voluntary basis • the employee is a member of, or has a member-like association with, a 'recognised emergency management body' • the body requests the employee to engage in the activity, or it would be reasonable to expect that such a request would have been made. 	<p>NIL</p>	
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<p>Are there any limits to the amount of community service leave and the employee is entitled to?</p>	<p>There is no set limit on the amount of community service leave an employee is entitled to. An employee is entitled to take leave for an amount of time reasonable in the circumstances while engaged in the eligible community service activity, including:</p> <ul style="list-style-type: none"> • travelling time associated with the activity and • rest time immediately following the activity 	<p>Establish reasonable requirements for the length of period in terms of operational requirements of the business.</p>	
<p>How many days is an employer required to pay an employee on jury duty?</p>	<p>New obligation on employer to pay employees on jury service their ordinary hours of work, <u>reduced by any amount of jury service pay</u>.</p> <p>Payment is limited to first 10 days of jury service</p> <p>Make-up pay is the difference between:</p> <p>any jury service pay the employee receives (excluding any expense-related allowances) and the employee's</p>	<p>NIL</p>	

	base rate of pay for each hour (or part hour) they would have worked, excluding separate entitlements, such as incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates.		
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<p>What evidence does an employee have to provide before they are entitled to jury service leave?</p>	<p>Before paying make-up pay, an employer may ask the employee to provide reasonable evidence:</p> <ul style="list-style-type: none"> • that they tried to claim jury service pay • of the total amount of jury service pay that has been paid (even if there was no jury service payment), • of the total amount of jury service pay that is payable, for the period (even if there was no jury service payment). <p>If the relevant State or Territory laws provide more beneficial entitlements than the NES in relation to eligible community service activities, those laws continue to apply. This may be particularly relevant for paid jury service.</p>	<p>NIL</p>	
<p>What are the nationally</p>	<p>New Years Day, Australia Day, Good Friday, Easter Monday, ANZAC Day, Queens Birthday, Christmas</p>	<p>NIL</p>	

observed public holidays?	Day, Boxing Day		
What public holidays are generally observed in the respective locations throughout the State?	South - Regatta Day and Hobart Show Day North - Recreation Day and Launceston Show Day North West - Recreation Day and Local Show Day	NIL	
Are employees entitled to refuse to work on public holidays?	Entitlement to be absent from work on a public holiday but an <u>employee can be reasonably requested to work</u> . If requested to work on a public holiday, an employee can reasonably refuse to work	Establish reasonable requirements for working on public holidays to establish the industry practice.	
What payment is an employee entitled to for working on a public holiday?	<ul style="list-style-type: none"> • Under the Aged Care Award the employee is entitled to double time and a half • Casuals are paid at the total rate of double time and a half. 	NIL	

	<ul style="list-style-type: none">• Under the Nurses Award employee is entitled to double time for working on a public holiday• Under the Home Care Award the employee is entitled to double time and a half		
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<p>Is substitution of a public holiday allowable under modern awards?</p>	<ul style="list-style-type: none"> • Under the Aged Care Award the employee is entitled have the same number of hours worked added to their annual leave. • Under the Nurses Award employee is entitled with the agreement of both parties to substitute another day for a public holiday • Under the Home Care Award that there is no provision for substitution 	<p>Establish reasonable requirements for substitution</p>	
<p>Is there such a thing has ceremonial leave?</p>	<p>Yes. The Modern Awards provides that an employee who is legitimately required by Aboriginal tradition to be absent from work for Aboriginal ceremonial purposes is entitled to unpaid ceremonial leave of up to 10 working days in any one year, with the approval of the employer.</p>	<p>NIL</p>	
<p>What is the notice period to terminate employment?</p>	<p>Notice of termination will remain same entitlement for employees as for employers</p> <p>Note that the Modern Awards provide for a Job Search entitlement which allows an employee to take up to one day off without loss of pay for the purpose</p>	<p>NIL</p>	

of seeking other employment when the employee has been given notice of termination by the employer.

Employees period of continuous service as at the day of notice	Notice	Where Employee is over 45 years of Age and has at least 2 years consecutive service with the employer	Notice
Not more than 1 year	1 week	Not more than 1 year	2 weeks
More than 1 year but not more than 3 years	2 weeks	More than 1 year but not more than 3 years	3 weeks
More than 3 years but not more than 5 years	3 weeks	More than 3 years but not more than 5 years	4 weeks
More than 5 years	4 weeks	More than 5 years	5 weeks

When does notice formally start?	Notice MUST be in writing and doesn't start until in writing and given to employee	Create templates for notices of termination	
Is notice paid at the base rate of pay?	No. Payment in lieu is at the full rate of pay i.e. overtime rate or including penalties, loadings etc	NIL	
Is there an exemption for employers with less than 15 employees to make severance payment for redundancy?	Yes. New legislated redundancy entitlement for employers with 15 or more employees based on scale previously determined by AIRC.	NIL	

<p>What service is counted for the purpose of working out periods of service for payment of severance?</p>	<p>Pre-commencement service is not counted for the purposes of redundancy pay if prior to 1 Jan 2010 the employee is covered by a contract, pre-reform award or other transitional instrument that did not provide for redundancy pay</p>	<p>There is no real benefit to this provision. The NAPSAs included the redundancy and severance provisions under section 47 AH of the Industrial Relations Act and therefore persons with the previous service with an employer would still be counted for the purpose of working out the severance component.</p>	
<p>What exemptions exist for non-payment of redundancy?</p>	<p>The redundancy pay NES applies to all employees in the federal system except the following:</p> <ul style="list-style-type: none"> • employees employed under a contract of employment for a specified period of time or a specified task • employees whose employment is terminated because of serious misconduct 	<p>NIL</p>	

	<ul style="list-style-type: none">• casual employees (including long-term casuals)• trainee employees (employed for a specified period) and apprentice employees• employees to whom an industry-specific redundancy scheme in a modern award applies• any employees specified in the Fair Work Regulations.		
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<p>In what circumstances will the employee not be entitled to redundancy pay?</p>	<p>An employee will not be entitled to redundancy pay in circumstances where:</p> <ul style="list-style-type: none"> • an employee transfers to a new employer following a transfer of business and the new employer recognises the employee's prior service with the previous employer, or • a business has been transferred and the employee rejects an offer of employment with a new employer on substantially similar terms and conditions, and the new employer recognises the employee's prior service with a previous employer. 	<p>NIL</p>	
<p>Are there any circumstances where an employer will not be required to pay redundancy severance payments?</p>	<p>Yes. The amount of redundancy pay an employee is entitled to may be reduced by FWA, where the employer obtains suitable alternative employment for the employee or the employer is unable to meet the redundancy pay obligations due to, for example, genuine financial difficulties.</p>	<p>This is a not often used argument but one that the cash-strapped sector could certainly put forward as an option. Nothing to do at this stage however it is something that participants</p>	

		should be mindful of.	
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<p>Under what legislation are long service leave payments payable to employees?</p>	<p>Long service leave entitlements in pre-modernised awards, NAPSAs or state and territory laws will continue</p> <p>If on 31 Dec 2009 Agreement contains LSL provisions – Agreement continues</p> <p>If on 31 Dec 2009 no Agreement – State Act applies</p> <p>If on 31 Dec 2009 Award contains LSL provisions – Award continues</p> <p>If on 31 Dec 2009 Multi State Agreement contains LSL provisions – apply to FWA</p>	<p>For most employers this situation will be the Long Service Leave Act 1976.</p> <p>The challenge will be that some may have agreements which enable the entitlement to mature at 10 instead of 15 years. On this basis such an interpretation would continue to apply.</p>	
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<p>Do employers have to give a Fair Work information statement to every employee?</p>	<p>No. The Fair Work information statement must be provided to each <u>new</u> employee after 1 January 2010</p>	<p>See example.</p>	
<p>What methods can an employer use to give new employees the Fair Work information statement?</p>	<p>The Statement may be given to an employee by:</p> <ul style="list-style-type: none"> • giving it personally to the employee • mailing to the employee’s residential address or a postal address nominated by the employee • sending it to the employee’s email address at work or to another email address nominated by the employee • sending by email to the employee’s email address at work or to another email address nominated by the employee an electronic link to the page on the Fair Work Ombudsman’s 	<p>Recommend that employers give a copy to each employee to avoid confusion.</p>	

	<p>website where the Statement is located or an electronic link that takes the employee directly to a copy of the Statement on the employer's intranet</p> <ul style="list-style-type: none">• faxing it to the employee's fax number at work, fax number at home or another fax number nominated by the employee• another method (an employer will need to ensure this meets the requirement to give the Statement to the employee, e.g. by courier where there is a signed acceptance by the employee of receipt of the Statement).		
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<p>What precautions should an employer to take regarding the Fair Work information statement?</p>	<p>Whatever method is used to give the Statement to an employee, it is recommended that the employer retain details of how the Statement was given</p> <p>Any employer who does not give the Statement to a new employee before, or as soon as possible after the employee starts employment, is contravening the terms of the NES.</p>	<p>NIL</p>	
<p>Will the modern awards stay as they currently are or will they change?</p>	<p>Initial 2 year review from commencement against the modern award objective and to check for anomalies or technical problems</p> <p>Four yearly reviews of all modern awards and an initial two year interim review. Variation of wages only where justified for</p> <p>work value reasons. Variation allowed outside four yearly reviews by application, to maintain minimum safety net or remove ambiguity or uncertainty and to correct error</p>	<p>NIL</p>	

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<p>Could some of the high income earners within the industry not be covered by the modern award?</p>	<p>Yes. High Income earners who have a guarantee of earnings over the legislated amount (\$108,300) and provided a written agreement that the Modern Award has no application.</p> <p>This may expose some employers to Unfair Dismissal claims even where the award does not “apply”, or the amount the employees earn is less than the threshold or they have not entered into the undertaking</p> <p>Subtle but important distinction.</p> <p>Also exposes employers to Adverse Action claims which will be discussed later.</p>	<p>NIL</p>	
<p>Can the exclusion of application to the modern award for high income earners be a condition of employment?</p>	<p>Yes. The exclusion for high income employees <u>could</u> be a condition of employment.</p>	<p>NIL</p>	
<p>What payments are taken into consideration to</p>	<p>When determining whether an employee is below or above the high income threshold, s.332 of FWA</p>	<p>NIL</p>	

<p>determine the high income threshold?</p>	<p>stipulates that the earnings to be taken into account include:</p> <ul style="list-style-type: none"> • the employee’s wages • amounts that are applied or dealt with at the direction of the employee (e.g. salary sacrifice amounts for additional superannuation or a motor vehicle), and • the money value agreed between the parties of any non-monetary benefits that are provided (for items such as car parking, food or accommodation). <p>Amounts that are <u>not taken</u> into account include:</p> <ul style="list-style-type: none"> • compulsory superannuation contributions that are made by the employer in accordance with superannuation legislation, or under some other law • payments the amount of which cannot be 		
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	<p>determined in advance (i.e. commissions, incentive-based payments and bonuses, and overtime that is not guaranteed), and</p> <ul style="list-style-type: none">• reimbursements.		
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<p>Does Fair Work Australia have any discretion to account for any non-monetary items which do not have an agreed value?</p>	<p>Yes. In the context of unfair dismissal claims, Fair Work Australia may also choose to count any non-monetary benefit for which the parties have not agreed a value, but which it is satisfied can be given a real or notional value (Fair Work Regulations 2009 reg 3.05(6)). There are also rules in reg 3.05 as to how to calculate earnings derived by employees on piece rates.</p>	<p>NIL</p>	
<p>What does a consultation clause require an employer to do?</p>	<p>The consultation clause only has application where an employer has made a definite decision to introduce a major change into the workplace that is likely to have a significant effect on employees.</p> <p>Significant effects are defined in the modern award and include matters such as termination of employment and major changes in composition and operation of the workplace.</p> <p>There is a requirement to notify the employees and their representatives.</p>	<p>This clause will become particularly important where there is some disagreement with the union. A breach of this clause entitles them to enact the dispute resolution procedure.</p> <p>Employers should be mindful not to be entering into discussions or</p>	

	<p>Discussions must commence as early as practicable.</p> <p>Provisions in the Aged Care, Nurses Award, Home Care are the same.</p>	<p>communicating matters of a significant nature where it is likely that they will be breaching such a clause by not having communicated this to be affected employees and their representatives. Further to this point employers should be mindful that there is a requirement to put matters into writing</p>	
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<p>When making an agreement what aspects of the dispute resolution procedure should employers be careful of?</p>	<p>Be careful about putting the FWA as the body for the dispute settlement process.</p> <p>FWA doesn't have the ability to arbitrate disputes unless they are included in the clause. The Modern Awards specifically has consent arbitration listed.</p> <p>Standard applies in the absence of a particular clause</p> <p>Recommend that you choose mediation or conciliation instead of arbitration in Agreements.</p>	<p>Consider agreements and altering the dispute resolution procedure.</p>	
<p>Are individual flexibility agreements based solely on financial criteria to determine whether an employee is better off or not?</p>	<p>The <u>better off overall test (BOOT)</u> is not based on the <u>financial criteria alone</u> of an individual flexibility arrangement. Where an individual is trading off terms and conditions for other benefits, the individual's circumstances may be taken into account.</p> <p>The Explanatory Memorandum gives the example of an employee who changes rostered hours to allow her/him to start early and leave early. The change of hours would attract a penalty rate under the agreement. The employer is unlikely to agree to allow this change if it imposes an additional cost. The</p>	<p>See attached example.</p>	

	<p>employer and employee can agree to vary the hours and penalty rates clauses of the agreement to allow the employee to choose his or her hours and forego the penalty. This would still pass the Better Off Overall Test as the employee is gaining the benefit of working hours of his or her own choosing rather than those imposed by the employer. Here, the benefit of leaving early to fulfil a personal obligation is taken to outweigh the lost penalty for this individual.</p>		
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<p>What are the standard items that can be included in an individual flexibility arrangement?</p>	<ul style="list-style-type: none"> Standard items include hours of work, overtime, penalty rates, allowances, annual leave loading 	<p>A series of templates could be created to provide the industry with options.</p> <p>In essence the drafting of the clauses require some particularity because they are based on individual circumstances. One size will not fit all</p>	
<p>Are you able to include other items not contained in the standard model clause for consideration in an individual flexibility arrangement where it is contained in an Enterprise Agreement?</p>	<ul style="list-style-type: none"> Yes but only when making an Enterprise Agreement. Provided that the terms are not unlawful. *Note you are confined to the terms of the Award's Flexibility clause 	<p>NIL</p>	
<p>How will an employer have to show genuine agreement?</p>	<ul style="list-style-type: none"> Must be in writing 	<p>NIL</p>	
<p>If either the employer or the employee do not wish to carry on with the</p>	<ul style="list-style-type: none"> Can be terminated by 4 weeks notice by either party 	<p>NIL</p>	

individual flexibility arrangement how long does it take to get out of it?			
If an employee is less than 18 years old are they able to sign an individual flexibility arrangement?	<ul style="list-style-type: none"> No. It must be signed by a parent/ guardian 	NIL	
Are employers able to require agreement to an individual flexibility arrangement as a condition of employment?	<ul style="list-style-type: none"> No. 	NIL	
Are employees able to take protected action to advance their claims for individual flexibility arrangements?	<ul style="list-style-type: none"> No 	NIL	
What happens if there is a dispute about the applicability of an individual flexibility arrangement?	<ul style="list-style-type: none"> Under s.204, where an employer and employee agree to enter into an arrangement that purports to be an individual flexibility arrangement, but the arrangement does not meet the requirements set out in s.203 (as 	NIL	

	<p>outlined above), the arrangement will still take effect as if it were an individual flexibility arrangement. However, the employer will be in breach of the flexibility term of the enterprise agreement if s.203 required the employer to ensure that a certain requirement was met, and the requirement was not in fact met</p>		
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<p>The AIRC created model transitional arrangements to allow the phasing in of modern awards into the current industrial landscape - what factors should employers generally be aware of?</p>	<ul style="list-style-type: none"> • Application for each MA is different • Check both the application and the terminology • Check the dates of application they are different 	<p>The three modern awards under consideration have adopted the model provisions.</p>	
<p>When will the Model Modern Award Transitional Provisions apply?</p>	<p>The AIRC has decided to delay the phasing provisions by 6 months to 1 July 2010. The effect will be that where the phasing provisions are included in an award the pre-modern award conditions will continue to apply until 1 July 2010 when the modern award obligations will commence. All other Modern Awards provisions will apply from 1 January 2010.</p>	<p>See above already discussed</p>	
<p>What provisions can be phased in the Model clause?</p>	<p>The AIRC has restricted the application of phasing provisions to:</p> <ul style="list-style-type: none"> • minimum wages • casual and part-time loadings 	<p>See above already discussed</p>	

	<ul style="list-style-type: none">• Saturday, Sunday, public holiday, evening and other penalties• shift allowances/penalties		
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Are allowances phased in under the transitional arrangements?	No.	NIL	
Are over-award payments able to be absorbed in the transitional phase?	Yes the monetary obligations imposed on employers by the modern award may be absorbed into over-award payments. Nothing in a modern award requires an employer to maintain any over-award payment.	These will have to be determined on a case-by-case basis. **NB The transitional rates apply only to the NAPSA (ie as the comparator) <u>not</u> what the employer is paying vs the Modern Award rates.	
How will the Model phasing provisions operate?	The AIRC has introduced a 5 step phasing process with each step having a weight of 20%. The provisions provide for the phasing-in of increases and decreases in loadings and penalties in five equal instalments between the first pay period on or after 1 July 2010 and the first pay period on or after 1 July 2014.	See attached examples.	

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<p>If you already have an enterprise agreement does this prevail over the modern award</p>	<p>Yes. If employment is covered by an industrial agreement (e.g. collective agreements, certified agreements, AWAs, ITEAs and PSAs) that came into operation before 1 January 2010, modern awards do not affect an employee’s rights and entitlements.</p> <p>E.g. if you have a 20% loading for casuals that will continue to apply not the 25% amount in the Modern Award or the transitional amount</p> <p>However, if an employee is paid less than the minimum wage under a relevant modern award, the pay rate must be raised at least to the modern award transitional amount.</p>	<p>Individual employers will need to check the transitional provisions only for minimum wages.</p>	
<p>Once an employer knows which modern award applies to them what should they do?</p>	<ul style="list-style-type: none"> • Make a comparison document • Assess \$ and operational impact • Check contracts for compliance 	<p>Employers will have to make individual decisions based on their current resources or engage consultants to do the work for them.</p>	

	<ul style="list-style-type: none">• Consider agreement options• Draft transitional provisions• Train your staff• Review all policies and procedures		
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<p>What leave provisions should employers consider for their award-free employees?</p>	<p>Amend the ability to cash out annual leave from 2 weeks per year of service to any amount as long as 4 weeks' leave remains [available for employees not covered by a modern award].</p>	<p>Case-by-case analysis</p>	
<p>How can employers tighten up notification requirements for the taking of personal leave?</p>	<p>Introduce reasonable obligations on employees to produce medical certification or a statutory declaration regarding absence for personal leave – directed to confirming whether there is a genuine reason for the work absence. Employers may require (reasonable) escalating certification requirements based on the period or pattern of absences. The obligation to provide certification must not extend beyond what would be required to satisfy a reasonable person that the absence was taken for a permissible reason justifying personal leave. Modern awards may include medical certification requirements, with which the contract should be consistent. The employee should acknowledge in the contract that the employer's certification</p>	<p>Industry-wide policies and procedures could be developed on behalf of the AST. This has been notoriously difficult to achieve because most employers have their own policies and procedures. Some allow a day's grace others require medical certificates for all instances. Some recent enterprise agreements expressly state evidence from allied health professionals will be accepted e.g. pharmacists,</p>	

	requirements are reasonable.	chiropractors, physios etc.	
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<p>In providing written contracts of employment what should employers be mindful of in relation to set off provisions?</p>	<p>Review set-off provisions to make specific reference to new modern award entitlements – so that above-award payments are stated to be applied to meet modern award monetary entitlements, or potentially set-off provisions with an Individual Flexibility Agreement annexed to the employment contract that (lawfully) trades off higher rates of pay for non-application of modern award entitlements to overtime, penalty rates, allowances, leave loading and roster restrictions.</p>	<p>Case-by-case analysis</p>	
<p>How would you provide for an entitlement to take leave in advance?</p>	<p>Introduce a written consent for deduction from an employee’s wages for annual or sick leave taken in advance (which contains express agreement that this is for the employee’s benefit). [Note that most modern awards contain this “Paid leave in advance of accrued entitlement” provision, so that this contractual consent is generally only required for non-modern award employees].</p>	<p>Case-by-case analysis</p>	

<p>What precautions should employers take to ensure that redundancy and severance pay entitlements are met for their executives?</p>	<p>Introduce a clause for executives, so that where they are provided with termination pay under the contract in circumstances of redundancy, this is specifically paid to meet the NES requirements to pay notice of termination and redundancy pay</p>	<p>Case-by-case analysis</p>	
<p>How do employers go about ensuring that the modern award does not apply to their executives earning over a high income threshold?</p>	<p>For employees earning more than \$108,300 per annum who may be award-covered, add a guaranteed earnings clause to exclude award coverage.</p>	<p>Case-by-case analysis</p>	
<p>If averaging of hours is important for executives how will you average the hours?</p>	<p>The averaging period for maximum hours of work should be decreased from 12 months to 6 months. If appropriate, managerial and executive employees should acknowledge in the employment agreement that the required hours to complete the job are reasonable in the circumstances</p>	<p>Case-by-case analysis</p>	
<p>Is the qualifying period the same as the minimum employment period?</p>	<p>No. Change "qualifying period" (for unfair dismissal) to "minimum employment period".</p>	<p>NIL</p>	
<p>Can I keep on referring to</p>	<p>No. References to the Workplace Relations Act</p>	<p>NIL</p>	

the old Act and people will know what I mean?	should be replaced with the Fair Work Act		
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